BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVARISTO XOLOTL	)	
Claimant	)	
	)	
VS.	)	
	)	
TOVAR CONSTRUCTION and	)	
ACORD ROOFING CO.	)	
Respondents	)	Docket No. 1,037,277
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the September 4, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for additional medical treatment finding that "[t]he [parties'] employment agreement occurred in Missouri, so the Kansas act does not apply to this case."[1]

The claimant requests review of whether or not the ALJ erred by denying his request for medical treatment based on a lack of jurisdiction. Claimant argues that the ALJ's Order should be reversed and the requested medical treatment should be provided, as claimant's contract for employment was created in Kansas.

The Fund contends that the ALJ should be affirmed in all respects.

---

[1] ALJ Order (Sept. 4, 2008) at 2.

Neither respondent was present at the preliminary hearing nor have they submitted any brief with the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order accurately and succinctly sets forth the facts and circumstances surrounding claimant's July 17, 2007 accident. The determinative issue is whether the Kansas Workers Compensation Act (Act) applies to this claim.

The Act applies to work-related accidents sustained outside the state when the employment contract is made within the State of Kansas, unless the contract otherwise specifically provides:[2]

> . . . That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . . [3]

Here there is no contention that either respondent conducted business in the State of Kansas and it is uncontroverted that claimant's work-related accident occurred in the State of Missouri. Therefore, under K.S.A. 44-506, the Kansas Workers Compensation Act will only apply if the claimant's contract of employment was made within the State.

In the case of *Chapman*[4], the Supreme Court of Kansas reaffirmed the State's policy of liberally construing the Kansas Workers Compensation Act for the purpose of bringing employers and employees within its provisions and to provide the protections of the Act to both, citing K.S.A. 44-501(g).

In *Shehane*,[5] the Court held:

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer

---

[2] There is no contention in this claim that claimant had a contract with anyone that contained a choice of law provision.

[3] K.S.A. 44-506.

[4] *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901 (1995).

[5] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

> during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973). . .

Highly simplified, claimant argues that he was in Kansas at his home and was contacted by Mr. Martinez about working on a roofing job. He accepted the job, via the phone call, while in Kansas. Thus, claimant's argument goes, under the case law discussed above there is Kansas jurisdiction for his claim. In order to prevail under this theory, claimant must establish that when Mr. Martinez, his friend and co-worker, contacted him about the job he was acting as an agent of Tovar Construction, a roofing contractor that contracted with Acord Roofing Co., the company who had the original contract for the roofing job where claimant was injured.

The ALJ concluded that claimant failed to establish such a relationship between Mr. Martinez and either Tovar Construction or Acord Roofing Co. He noted, "[r]ather, Martinez acted as an agent for the claimant and the rest of their crew in obtaining work for all of them from Tovar. Martinez made the offer of employment and Tovar made the acceptance in Parkville, Missouri."[6]

This member of the Board has reviewed the record and concurs with the ALJ's analysis. Mr. Martinez and claimant, along with several other people, were out of work. Mr. Martinez contacted a representative of Tovar Construction and asked if they needed help. Mr. Martinez was asked to bring his "crew" of roofers and in turn, Mr. Martinez contacted claimant, as well as others, and they appeared for work in Parkville, Missouri. Claimant worked 2 days before his injury. The relationship both claimant and Mr. Martinez describe is just as the ALJ found - Mr. Martinez was acting as the organizer of the group and he would transport the group to the job site. Neither claimant or Mr. Martinez had ever worked for Tovar Construction before this job and at no time did claimant speak with anyone from Tovar Construction. There is simply no evidence to suggest that Mr. Martinez was acting as any sort of agent for Tovar Construction when he contacted claimant about the job. And an agency relationship will not be inferred because a third person assumed it existed.[7] For these reasons, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

---

[6] ALJ Order (Sept. 4, 2008) at 1-2.

[7] *Carver v. Farmers & Bankers Broadcasting Corporation*, 162 Kan. 663, 179 P.2d 195 (1947).

[8] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated September 4, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2008.

_____
JULIE A.N. SAMPLE
BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
Erika Jurado-Graham, Attorney for Claimant
Ronald P. Wood, Attorney for the Fund
Tovar Construction, Respondent
Acord Roofing Company, Respondent
Kenneth J. Hursh, Administrative Law Judge